

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

STEVEN M. LEONI,

CASE NO.: 20-40157-KKS

CHAPTER: 11

Debtor.

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ORDER GRANTING, IN PART, AND DENYING, IN PART, *BBX CAPITAL'S MOTION TO EXTEND TIME TO OBJECT TO DEBTOR'S DISCHARGE OR TO CHALLENGE WHETHER CERTAIN DEBTS ARE DISCHARGEABLE* (DOC. 80)

THIS CASE came before the Court for hearing on July 23, 2020, on *BBX Capital's Motion to Extend Time to Object to Debtor's Discharge or to Challenge Whether Certain Debts are Dischargeable* ("Motion to Extend," Doc. 80), Debtor's objection, and the parties' replies and responses in connection with the Motion to Extend.¹ Counsel for Debtor and BBX Capital Asset Management, LLC ("BBX") appeared at the hearing. At the conclusion of the hearing the Court announced that it

¹ *Debtor-in-Possession's Objection to Motion to Extend Time to Object to Debtor's Discharge or to Challenge Whether Certain Debts are Dischargeable*, Doc. 88; *BBX Capital's Reply to Debtor-in-Possession's Objection to Motion to Extend Time to Object to Debtor's Discharge or to Challenge Whether Certain Debts are Dischargeable*, Doc. 91; *Debtor-in-Possession's Response to BBX Capital's Reply to Debtor-in-Possession's Objection to Motion to Extend Time to Object to Debtor's Discharge or to Challenge Whether Certain Debts are Dischargeable* (Doc. 91), Doc. 93.

would grant the Motion to Extend as to objections to discharge and give BBX through August 28, 2020 within which to file a § 727 complaint. The Court took the matter under advisement as to § 523 objections to dischargeability.

Having thoroughly reviewed the pleadings and applicable case law, and having heard argument of counsel, for the reasons set forth below the Motion to Extend to file a § 523 action is due to be denied.

BACKGROUND

The facts that follow appear undisputed. Pre-petition, Debtor was a real estate developer and manager of student housing. In that capacity, in 2008 Debtor and an affiliated entity were doing business with a bank (BankAtlantic). Debtor signed and delivered to BankAtlantic a personal guaranty of certain debt (“Guaranty”). BankAtlantic assigned its interest in the Guaranty to BBX in July of 2012. BBX filed suit against Debtor in state court to enforce the Guaranty in July of 2013. The state court entered a final judgment in favor of BBX and against Debtor on February 3, 2020 in the amount of \$4,209,073. Debtor appealed the final judgment in March of 2020, filed the instant Chapter 11 petition on April 3, 2020, and obtained stay relief from this Court to continue the appeal, which as

of the date of the hearing remained pending.

A month before Debtor filed his Chapter 11 petition, BBX commenced proceedings supplementary against Debtor's wife, Christine Leoni ("Ms. Leoni"), seeking to avoid as fraudulent various property transfers allegedly made to her by Debtor. Beginning in May of 2020, Debtor and BBX began informal discovery, ostensibly with respect to a different motion filed in this case by BBX.² According to BBX, on June 1, 2020, BBX requested tax and financial documentation related to one (1) of the entities transferred to Ms. Leoni.³ Over the next week, BBX requested copies of personal financial statements submitted by Debtor to any lender, and documents related to Debtor's transfer of his interests in other entities to Ms. Leoni.⁴

BBX filed the instant Motion to Extend on the deadline to file § 727 and § 523 actions, June 29, 2020. BBX asserts that "cause" exists to grant it an additional ninety (90) days to file an action under § 523, citing complexity of issues and logistical difficulties associated with the COVID-19 pandemic. According to BBX, Debtor's former partner

² *Motion for Authorization to Maintain and Prosecute Adversary Proceedings to Avoid Fraudulent Transfers*, "Motion for Authorization," Doc. 17. Doc. 91, p. 3.

³ Doc. 91, p. 3.

⁴ *Id.*

testified under oath on June 29, 2020, that Debtor “concocted a plan to protect his assets from creditors by shifting all his assets to his wife’s name.”⁵ In July of 2020, BBX obtained copies of 2016-2017 income tax returns and financial documents of a variety of entities in which Debtor previously held ownership interests.⁶ Based on information contained in these documents, BBX alleges that “the Debtor made misrepresentations to BankAtlantic” during 2008 and 2009.⁷

DISCUSSION

Bankruptcy Rule 4007(c) provides that complaints under § 523(c) “shall be filed not later than 60 days following the first date set for the meeting of creditors under § 341(a).”⁸ The Court may grant an extension of the deadline for cause.⁹ “Cause” is not defined in the Bankruptcy Code.¹⁰ A determination of whether “cause” exists to extend the deadline should be based on several factors:

(1) whether the debtor refused in bad faith to cooperate with creditor; (2) whether creditor had sufficient notice of the deadline and the information to file an objection; (3) the

⁵ *Id.* at 4.

⁶ *Id.* at 4-5.

⁷ *Id.* at 5.

⁸ Fed. R. Bankr. P. 4007(c).

⁹ *Id.*

¹⁰ *In re Ballas*, 342 B.R. 853, 856 (Bankr. M.D. Fla. 2005), *aff’d*, 212 F. App’x 867 (11th Cir. 2006) (*citing In re Farhid*, 171 B.R. 94 (N.D.Cal.1994)); *In re Trapp*, No. 19-02876-TOM-7, 2019 WL 6869630, at *2 (Bankr. N.D. Ala. Dec. 16, 2019).

possibility that the proceedings pending in another forum will result in collateral estoppel on the relevant issues; (4) whether creditor exercised diligence; (5) the complexity of the case; (6) whether granting the delay will prejudice the debtor; (7) the length of the delay and its impact on efficient court administration.¹¹

A creditor's diligence, the fourth factor, is deemed the most significant element of the test; a lack of diligence alone can preclude approval of an extension.¹² To satisfy the diligence requirement for an extension of the deadline to file § 523 complaints, the party seeking the extension must have taken meaningful discovery efforts in advance of the deadline.¹³

BBX did not move for a 2004 examination or commence any formal discovery before the deadline for filing a § 523 complaint, even though three (3) attorneys for BBX filed notices of appearance less than a week after Debtor filed his petition.¹⁴ The Court issued the § 341 notice containing the deadline for filing § 523 complaints on April 7, 2020.¹⁵ The only formal discovery by BBX shown on the docket comprises two (2)

¹¹ *In re Tumbleson*, 596 B.R. 913, 915 (Bankr. N.D. Fla. 2018) (citing *In re Boltz-Rubinstein*, 454 B.R. 614, 620 (Bankr. E.D. Pa. 2011)). Factors one through five derive from *In re Ballas*, 342 B.R. at 856.

¹² *E.g.*, *In re Woods*, 260 B.R. 41, 44-45 (Bankr. N.D. Fla. 2001) (quoting *In re Grillo*, 212 B.R. 744, 747 (Bankr. E.D.N.Y. 1997)); *In re Trapp*, 2019 WL 6869630, at *2.

¹³ *In re Denike*, 322 B.R. 452, 455 (Bankr. M.D. Fla. 2005) (“[T]here can be no cause for justifying an extension of time where the party seeking the extension failed to diligently pursue discovery prior to the expiration of the deadline.”).

¹⁴ Docs. 4, 7, 9.

¹⁵ Doc. 14.

notices of serving subpoenas filed almost one (1) month after the deadline.¹⁶

Courts have weighed a movant's failure to utilize official discovery methods against a finding of adequate diligence.¹⁷ BBX's efforts at informal discovery in this case commenced in mid-May, about a month and a half after its attorneys appeared.¹⁸ Similar periods of inaction have been found to demonstrate a lack of diligence.¹⁹

BBX cites the COVID-19 pandemic as justification for its delayed and informal discovery, asserting that its efforts were hindered by attorneys' transitions to working remotely. But BBX bases its allegation that Debtor engaged in inappropriate behavior primarily on documents that have been in existence for years; including throughout the duration of BBX's litigation against Debtor. So, social-distancing considerations

¹⁶ Docs. 90, 96.

¹⁷ *Ballas*, 342 B.R. at 857; *In re Dalton*, No. 07-03550-TOM-7, 2007 WL 4553992, at *3 (Bankr. N.D. Ala. Dec. 20, 2007).

¹⁸ Doc. 91, p. 3.

¹⁹ *Woods*, 260 B.R. at 43-44 (delay of forty-six days between movant's counsel receiving notice of the bankruptcy and initial investigation indicated of lack of diligence); *In re Duncan*, No. 09-01255-TOM7, 2009 WL 2849539, at *1, 5 (Bankr. N.D. Ala. Aug. 31, 2009) (finding lack of diligence where initial discovery commenced two months after petition date); *Denike*, 322 B.R. at 455-56 (finding lack of diligence when movant's attorney failed to perform any investigation until forty-three days after appearing); *Dalton*, 2007 WL 4553992, at *3 (first discovery request made sixty-nine days after bankruptcy filing).

are no excuse here.²⁰

Even assuming the current pandemic caused delays in counsels' pursuit of discovery, BBX's long history with Debtor militates against granting the extension requested. This Court and others have deemed an extension under Rule 4007(c) inappropriate where a creditor, through prepetition dealings with the debtor, becomes or should have become aware of the conduct underlying the § 523 action.²¹ In *In re Tumbleson*, a lender sought an extension of time to file an action objecting to dischargeability of debt and to deny debtor's discharge; the target of its proposed § 523 claim was the debtor's alleged overstatement of the value of a closely-held corporation on a financial statement issued a year and a half pre-petition.²² This Court denied the extension, in part because the lender failed to take any action to evaluate the asset before the bankruptcy filing even though it had learned facts that cast doubt on the

²⁰ Additionally, Debtor alleges and BBX does not dispute that during the COVID-19 pandemic, in furtherance of its efforts to collect on the debt, BBX scheduled a deposition via Zoom and filed various motions in bankruptcy cases filed by two judgment co-debtors. Doc. 88, pp. 3-4.

²¹ *In re Tumbleson*, 596 B.R. 913, 917 (Bankr. N.D. Fla. 2018); *In re Denike*, 322 B.R. 452, 455 (Bankr. M.D. Fla. 2005) (finding lack of diligence where creditor had been litigating related claim with debtor in state court for six years prepetition).

²² *Tumbleson*, 596 B.R. at 914-15.

debtor's valuation.²³ In *In re Watson*, this Court granted a creditor an extension of time to file a § 727 complaint but denied the same creditor's motion for an extension to file a § 523 action.²⁴ The creditor had conducted extensive postpetition discovery, but had learned of and sued on the fraudulent transfer underlying its § 523 claim more than five (5) years pre-petition.²⁵

BBX concedes that it acquired BankAtlantic's interest in the Guaranty after Debtor had been in default for more than three (3) years. BBX has been litigating against Debtor since 2013. That litigation has afforded BBX ample opportunity to uncover details of Debtor's alleged fraudulent transfers to Ms. Leoni and misrepresentations to BankAtlantic.

BBX claims that it does not currently have sufficient facts to file a complaint under § 523 but offers no explanation as to why it did not discover such facts before Debtor filed bankruptcy, or between the petition date and filing the Motion to Extend. BBX maintains that it has

²³ *Id.* at 917 (The adverse consequences of a business decision to delay an investigation "are not sufficient grounds" for an extension beyond the initial sixty days provided in the Bankruptcy Code and Rules.).

²⁴ *In re Watson*, No. 13-30420-KKS, 2014 WL 10879203, at *4-5 (Bankr. N.D. Fla. May 21, 2014) (*quoting In re Moseley*, 470 B.R. 223, 228 (Bankr. M.D. Fla. 2012)) (noting that generally the acts giving rise to a nondischargeable debt occur prepetition).

²⁵ *Id.* at *5.

not had sufficient time to investigate Debtor's assets and liabilities. But its discovery efforts to date relate not to Debtor's current assets and liabilities but to assets, liabilities and transfers dating back several years.

As was the case in *Watson*, BBX had fairly detailed information regarding the basis for any § 523 claim before Debtor filed bankruptcy, and certainly had copious opportunity to obtain more.²⁶ Whether or not such information alone could have supported an action under § 523, it certainly offered clear guidance for formal discovery in this case. "A lack of diligent effort by a creditor can be fatal to a creditor's last-minute attempt to achieve an extension of the [§ 523] deadline."²⁷

BBX has not provided evidence of other factors that might establish "cause" to grant an extension of time to file a § 523 complaint. BBX does not allege, nor is there evidence, that Debtor has refused in bad faith to cooperate with its informal discovery requests. BBX had sufficient notice of the court-ordered (and statutory) deadline. No proceeding pending in another forum will result in collateral estoppel on the relevant issues.

²⁶ BBX's prepetition state-court proceedings supplementary and the Motion for Authorization, (filed five days postpetition) confirm such knowledge. Doc. 17, p. 2.

²⁷ *In re Woods*, 260 B.R. at 44-45.

This is not a complex case such that the Court should grant BBX relief. Although BBX lists numerous entities that Debtor allegedly transferred and about which it has gathered information, as the Bankruptcy Court for the Middle District of Florida once stated: “the entanglement of the parties and the intricacy of the issues do not camouflage the [creditor’s] neglect to pursue discovery.”²⁸

Prejudice to Debtor and probable delay of efficient court administration in this case also weigh against granting the extension. The duration of the parties’ state court litigation demonstrates that a § 523 action is likely to be prolonged. BBX seeks ninety (90) more days to file a § 523 action; any such proceeding will undoubtedly result in protracted litigation. Uncertainty over a possible nondischargeability ruling could adversely impact Debtor’s ability to file and confirm a plan, and thus interfere with efficient administration of this case.

CONCLUSION

BBX has long had opportunity to discover the basis for any § 523 claim; especially one that originated in 2008. BBX has failed to demonstrate cause under Fed. R. Bankr. P. 4007(c) to extend the deadline

²⁸ *In re Ballas*, 342 B.R. 853, 857 (Bankr. M.D. Fla. 2005), *aff’d*, 212 F. App’x 867 (11th Cir. 2006).

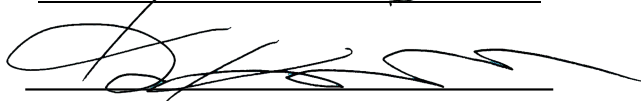
to file an action under § 523.

For the reasons stated, it is

ORDERED:

1. The Motion to Extend²⁹ is GRANTED, in part, as announced at the conclusion of the hearing: BBX has until August 28, 2020 to file an action objecting to Debtor's discharge under § 727.
2. The Motion to Extend is DENIED as to BBX's request for an extension of time under Fed. R. Bankr. P. 4007(c) to file an action under 11 U.S.C. § 523.

DONE and ORDERED on August 11, 2020.



KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Counsel for BBX is directed to serve a copy of this Order on interested parties and file a certificate of service within three (3) days of entry of this Order.

²⁹ *BBX Capital's Motion to Extend Time to Object to Debtor's Discharge or to Challenge Whether Certain Debts are Dischargeable* (Doc. 80).